Editor's note: appealed -- stipulated dismissal, Civ.No. 82-172 (D.Or. Mar. 1, 1983)

VIVIAN SULLIVAN KARLSON

IBLA 81-126 Decided November 13, 1981

Appeal from decision of Oregon State Office, Bureau of Land Management, declaring mining claim abandoned and void. OR MC 8486.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

   Regulation 43 CFR 3833.1-2(d) states that a location notice for each mining claim filed for recordation shall be accompanied by a service fee. This is a mandatory requirement, and without payment of the fee, there is no recordation. The failure to file such instruments as are required by 43 CFR 3833.1 and 3833.2 within the time periods prescribed therein must be deemed conclusively to constitute an abandonment of the mining claim.

2. Notice: Generally -- Regulations: Generally -- Statutes

   All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

APPEARANCES: William T. Murray, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Vivian Sullivan Karlson has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated October 10,

1980, declaring the Grand Forks placer mining claim, OR MC 8486, abandoned and void, pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and its implementing regulations, 43 CFR Subpart 3833, for failure to submit timely the filing fee required by 43 CFR 3833.1-2(d).

Appellant's mining claim was located on September 21, 1938, and filed for recordation with BLM on October 4, 1978. The copy of the notice of location, however, was not accompanied by a $5 service fee. This fee was received on September 3, 1980.

In her statement of reasons for appeal, appellant makes a number of arguments, namely: (1) BLM is estopped to deny that appellant filed timely a copy of her notice of location; (2) amended regulation 43 CFR 3833.1-2(d) (44 FR 9722 (Feb. 14, 1979)), cannot be applied retroactively to a filing made in 1978; (3) there is no authority in section 314 of FLPMA, supra, to declare a mining claim abandoned and void on the basis of untimely payment of the filing fee; and (4) appellant has been denied due process of law in violation of the U.S. Constitution by virtue of the forfeiture provision in section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976).

[1] Section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976), provides in relevant part that the owner of an unpatented mining claim "located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location." See 43 CFR 3833.1-2(a). The statutory deadline for filing a copy of a notice or certificate of location was, therefore, October 22, 1979.

There is no mention in section 314 of FLPMA, supra, of the requirement of submitting a filing fee when filing a copy of a notice or certificate of location. That requirement is provided in the implementing regulations, issued pursuant to section 304 of FLPMA, 43 U.S.C. § 1734 (1976). 1/

The applicable regulation, 43 CFR 3833.1-2(d), as originally published in the Federal Register (42 FR 5300 (Jan. 27, 1977)), required that: "Each claim or site filed shall be accompanied by a $5 service fee which is not returnable." (Emphasis added.) We have long held that this is a mandatory requirement, and without payment of the filing fee there is no recordation. See, e.g., Edward J. Szynkowski, Jr., 53 IBLA 310 (1981); Joe B. Cashman, 43 IBLA 239 (1979). Accordingly, as of October 22, 1979, the filing deadline, appellant had not complied with the filing requirement of section 314(b) of FLPMA, supra, and its implementing regulation 43 CFR 3833.1-2(a). Appellant's filing is deemed to have been made on September 3, 1980.

1/ The court in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), aff'd, Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), upheld the service fee as a reasonable requirement under the statute.

Section 314(c) of FLPMA, supra, provides that the failure to file in accordance with section 314(b) of FLPMA, supra, "shall be deemed conclusively to constitute an abandonment of the mining claim." See 43 CFR 3833.4(a). In such circumstances, BLM may properly declare the mining claim abandoned and void. Edward J. Szynkowski, Jr., supra at 312, and cases cited therein. This is the result of the failure to record timely and not merely the untimely payment of the filing fee.

Appellant argues that she was entitled to notice of the requirement of submitting a $5 service fee. She points to Organic Act Directive (OAD) No. 76-11, Change 2, dated March 25, 1977, which provides instructions to all BLM state offices on internal procedures regarding recordation of mining claims and in particular states: "If a filing is received without a service fee, it will be accepted and serialized. The claimant will be allowed 30 days to remit the fee. If it is not received within the 30 days, the filing for recordation will be rejected" (OAD at 2). Appellant argues that OAD No. 76-11, Change 2, contemplates that the filing would be returned within 30 days, which would have given her time to submit the filing fee, along with the notice of location, before the October 22, 1979, deadline.

[2] The applicable regulation, 43 CFR 3833.1-2(d), was amended on February 14, 1979, effective March 16, 1979, to include the following sentence: "A notice or certificate of location shall not be accepted if it is not accompanied by the service fee and shall be returned to the owner." Appellant argues that the amended regulation should not be applied retroactively to a filing made in 1978. However, the added language can only support appellant's contention that BLM should have returned appellant's notice of location in time for her to submit the filing fee, along with the notice of location, before the October 22, 1979, deadline. While it is arguable that BLM should have somehow notified appellant that it was necessary to submit the service fee, BLM's failure to do so did not create any rights in appellant. The regulation is clear that the service fee must accompany the notice of location. All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Edward W. Kramer, 51 IBLA 294 (1980). Accordingly, appellant is presumed to have known of the filing fee requirement.

Moreover, we do not believe that appellant has presented an adequate case for the imposition of estoppel. We have held that estoppel will not lie in the absence of "affirmative misconduct by a responsible Federal employee." Lynn Keith, 53 IBLA 192, 198, 88 I.D. 369, 373 (1981). Appellant bases her case of estoppel on the fact that BLM failed to notify her of the filing fee requirement even after being requested in a letter accompanying her notice of location to "let [her] * * * know what more you want," and the fact that BLM acknowledged receipt of her 1979 affidavit of annual assessment work which she "understood * * * to mean that recordation of her claim was in good order." Failure to notify a mining claimant of a filing requirement under section 314 of FLPMA, supra, does not constitute "affirmative misconduct" giving rise to an estoppel. Lynn Keith, supra.

Regarding appellant's constitutional argument, as we have said many times, the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is unconstitutional. See, e.g., Lynn Keith, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge